No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and THE NATIONAL SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FARNHAM P. GRIFFITHS,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Appellee.

PERNAU-WALSH PRINTING CO.

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BRIEF FOR APPELLEE.

Statement of Case.

This is a libel *in rem* to recover the value of supplies furnished to the Steamship "Portland" on five different occasions between July 5, 1912, and November 27, 1912. Fuel oil was furnished once at the port of San Francisco; fuel oil and dunnage at Oleum, California; and fuel oil three times at Balboa, Canal Zone.

The home port of the vessel was New York. In every instance the supplies were furnished by the appellee upon an order from the master of the vessel. During the whole period the vessel was under charter to the California Atlantic Steamship Company and of this fact appellee had knowledge.

For the value of these supplies, appellee claims a lien on the vessel. The question whether the lien exists must be determined by the Act of June 23, 1910, Chap. 373, 36 U. S. Statutes at Large, page 604 (U. S. Compiled Statutes 1916, page 8229).

For convenience of reference we quote the three sections of the Act which define the circumstances under which a lien for supplies arises:

> Act June 23, 1910, c. 373, Sec. 1. "*Maritime lien on vessel for repairs, supplies, etc., to be enforced in rem, without allegation or proof that credit was given to vessel.*
>
> Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> Sec. 2. *Persons presumed to have authority to procure repairs, supplies, etc., for vessel.*
>
> The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted.

No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Sec. 3. Officers and agents appointed by charterer, etc., included with persons specified in preceding section; no lien when want of authority to bind vessel was known to furnisher of repairs, supplies, etc.

The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor." (Compiled Stats.)

Before discussing the law applicable to the case at bar, we shall refer briefly to the history of the Act of 1910.

Condition of the law prior to the passage of the Act of 1910.

There was formerly much confusion in the law respecting the circumstances under which a lien for supplies would attach to the vessel. The law drew a sharp distinction between supplies ordered by the master in a foreign port and the supplies ordered by him in the home port. In the former case there was a presumption, subject to rebuttal, that the supplies were furnished on the credit of the vessel; in the latter, it was conclusively presumed that they were

furnished on the credit of the owner. When the owner himself ordered supplies in a foreign port, it was presumed that the credit of the vessel was not pledged.

The lien for supplies provided by State statutes and designed to protect the furnisher of supplies in the home port, gave some relief to the domestic tradesman, but did not altogether settle his case. According to one line of decisions, the conclusive presumption that supplies ordered in a home port were ordered on the credit of the owner was merely made a disputable presumption. According to the less numerous decisions, the State statutes established a conclusive presumption that the supplies were furnished on the credit of the vessel. Interrelated questions concerning the determination of the home port where there are joint owners, corporation owners, presumptions in case of conditional sale, in cases where there was a transfer of title pending performance of contract, etc., did not simplify matters. Similar questions arose where the vessel was under charter. In most of the cases we have suggested it was necessary to allege and prove that supplies were furnished on the credit of the vessel. Upon the confusion permeating the whole subject, see:

19 Eng. & Amer. Ency. of Law, pages 1093-1112;
The Yankee, 233 Fed. 919, at 924.

Purpose of the Act of 1910.

Amid this net work of presumptions and counter-presumptions, the Act of 1910 was passed. Its purpose

was to clarify. To this end the Act (1) creates a lien for supplies; (2) eliminates the distinction between foreign and domestic ports; (3) abolishes requirements of allegation and proof that credit was given to the vessel; (4) names certain persons as presumed to have authority to bind the vessel; (5) provides that the Act does not confer a lien when such persons did not have authority to bind the vessel, and such lack of authority was known, or ought to have been known, to the furnisher of supplies.

Many of the earlier sources of confusion disappear. Particularly, the elimination of the necessity of allegation and proof of credit to the vessel and the naming of certain persons as presumed to have authority to bind the vessel, must have been designed to fortify the position of one who furnishes necessary supplies to a vessel.

The Argument.

UNDER THE ACT OF JUNE 23, 1910, A LIEN ON THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT IS PRESUMED.

It is not disputed that the supplies furnished (fuel oil and dunnage) were of the kind contemplated in the statute as giving rise to a lien, provided, of course, that the other requirements of the statute were satisfied.

The persons named in the statute as presumed to have authority to bind the vessel for such supplies are:

> "The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted."

The supplies of oil and dunnage, for which libelant claims a lien, were furnished at San Francisco, Oleum and Balboa, upon the master's orders.

The libelant, therefore, has shown facts from which a lien for supplies will be presumed.

> *The Yankee,* 233 Fed. 919, at 925:
>
> "The effective provisions of this act, by which Congress disposed of the controversial features of the law of maritime liens, are those which dispense with proof that credit was given the vessel, and substitute a presumption in lieu of proof of the authority of the owner and of a person other than the owner to procure supplies and pledge the vessel. Being relieved of the necessity of proving credit to the vessel and being clothed with the presumption of the validity of the order, the libelant, upon proving delivery to the vessel, *enters court with a prima facie right to a maritime lien.*" (Italics ours.)

The burden is, therefore, upon the claimant to prove that the master was without authority to bind the vessel for the supplies furnished, such lack of authority being known or ascertainable by the libelant. *Emphatically, the burden is not on the libelant, as is erroneously stated on page 4 of claimant's brief, to prove that the master was authorized by the owner.*

II.

THE CLAIMANT HAS FAILED TO SHOW CIRCUMSTANCES WHICH DEPRIVE LIBELANT OF THE LIEN PRESUMED BY THE STATUTE.

Libelant entered court with a lien on the vessel presumed in its favor. To defeat the lien claimant must

show facts within Section 3 of the statute, providing that the Act does not confer a lien

> "when the furnisher knew or by the exercise of reasonable diligence could have ascertained that because of the terms of a charter party, agreement for the sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor."

Claimant relies upon two points, namely, that there was a general contract between the libelant and the charterer for the purchase of the fuel oil used by the charterer in operating its vessels; and that the charter under which the "Portland" was operated required the charterer to provide and pay for the fuel oil used by the vessel.

Under these circumstances claimant contends, first, that because of the general contract, the oil was in fact "procured" by the charterer, even though on "orders" from the master; secondly, that under the terms of the charter party neither the master nor the charterer had authority to bind the vessel. We shall answer these contentions in the order indicated.

(a) The argument that the oil was "procured" by the charterer and not by the master, even though on "orders" from the master, assumes that a distinction is to be made between the words "order" and "procure." (Claimant's brief, pp. 5, 6.)

If there is a distinction, it lies in the mind of the claimant, not in the statute. Observe the wording of the statute. In Section 1 the words are "any person furnish-

ing repairs, supplies * * * *upon the order* of the owner", etc. In Section 2 the heading uses the words "to procure", and the section itself reads: "The following persons shall be presumed to have authority * * * *to procure* repairs, supplies, etc." Section 3 provides that the Act does not confer a lien when the furnisher knew or should have known that the "person *ordering* the repairs, etc., was without authority, etc."

We submit that that the words "order" and "procure" are obviously used in the statute without distinction in meaning.

There is a suggestion in claimant's brief, conveyed rather by innuendo than by direct statement, that perhaps the master did not place oil requirements directly in the hands of the libelant and, therefore, did not "order" them (Br. pp. 9-10). We ask the attention of the court to Paragraph IV in the Memorandum for Stipulation of Facts (Apos. p. 18), wherein it is stated that

> "from time to time libelant furnished to said Steamer Portland fuel oil in the amounts as follows, upon orders from the master" (followed by a statement of the time, place, amount and value of the supplies furnished).

Under that stipulation, claimant cannot urge that there was not an "order" from the master for these supplies.

Conceding, therefore, that there was a general contract between the libelant and the charterer for fuel oil used by the charterer's vessels, it cannot be disputed but that the libelant furnished these supplies in

amounts and at times and places as they were "ordered" or "procured" by the master.

(b) The claimant's chief contention, however, is that where a charter party expressly provides that the charterer shall provide and pay for the supplies, nothing being provided in the charter party as to the power to impose liens upon the vessel, neither the charterer or the master has authority to impose liens upon the vessel for supplies.

Preliminary to the discussion of this point we may say that we do not dispute the rule and the authorities cited by claimant that libelant, knowing it was dealing with a charterer, was put on inquiry as to the terms of the charter party. But conceding this rule, what would libelant have learned had all the terms of the charter party been known and considered? Would libelant have known conclusively that the vessel could not be made responsible for any of the supplies furnished and used by her?

An examination of the charter party would not have disclosed that the master or charterer was without authority to bind the vessel for supplies of oil furnished at a distant port. The charter party simply states that the charterer shall provide and pay for the fuel. It does not in terms prohibit anyone mentioned in Section 2 of the Act of June 23, 1910, from binding the vessel for necessaries. A careful reading of the charter party by libelant would not have disclosed that the master, who is presumed to have authority to bind the vessel, had in fact no authority to do so.

The Act is mandatory in its provisions. We submit that a charter party, in order to withdraw the authority of the master to bind the vessel and to prevent the application of the lien presumed by the statute, must have a stronger provision than a mere clause that the charterer shall provide and pay for the fuel oil. Such a term merely regulates rights between the charterer and the owner and leaves untouched the liens in favor of third persons. Payment for supplies is one thing. A lien attaching to the vessel until the supplies are paid for is another. A term in the charter party relating to the first matter cannot be substituted for a clause governing the second.

The question was squarely before the court in

The South Coast, 233 Fed. 327.

In that case the charter party required the charterer to pay the expenses incurred in operating the vessel as well as to pay for the supplies furnished the vessel. It did not, however, in terms deprive the master of his authority to bind the vessel for the supplies so furnished. In ordering a decree for the libelant, Judge Dooling said:

> "But by the charter in the instant case the person ordering the supplies—that is to say, the master—was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, *they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor.* (Italics ours.)

Upon appeal this court affirmed the decree and said (247 Fed. 84):

> "The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter party, to take his directions from the charterer. The libelant was apprised of the existence of the charter party, and was warned by the owner not to furnish supplies on the ship's credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner's representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.
>
> It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship

> to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, *and unless there is something more in the charter party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, so be subverted.*" (Italics ours.)

Is there anything in the Portland charter that "unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship"?

Certiorari was then granted by the Supreme Court of the United States and the judgment of this court was affirmed in

251 U. S. 519; 64 L. Ed. 311.

The Supreme Court, speaking through Mr. Justice Holmes, expressly held that the charter party did not exclude the power of the master to impose a lien on the vessel for supplies, and, therefore, there was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Claimant's attempt to distinguish The South Coast.

Claimant's brief attempts with much particularity and assiduity to distinguish *The South Coast* from the case at bar.

It is argued that in the instant case the charter party does not recognize that liens may be imposed by

the charterer, the reasons for this contention being that the charter party provides that the charterer shall pay for the fuel; that the charter was a time charter, hire being payable per running day whether the vessel moved or not; and that the charter party provided that a lien for moneys paid in advance could be imposed by the charterer.

These facts do not afford ground for distinguishing the two cases. The charter party in *The South Coast* also required the charterer to provide and pay for the supplies as well as all the operating expenses of the vessel. As to the suggestion that the charter hire of the "Portland" was payable per running day whether the vessel moved or not (the inference being that it was not for the benefit of the owner that fuel oil should be bought, immaterial if true), we wish to point out that the charter hire of the "South Coast", or the purchase price under the conditional bill of sale, did not depend upon the operation of the vessel. In that case, too, it made no difference to the owner whether supplies and fuel were bought, or whether the vessel was kept stationary. But the existence of a lien is not determined by the presence or absence of benefit to the owner from the operation of the vessel. The Act of 1910 was not drawn upon the theory that a lien on the vessel was conferred only when it was given for supplies benefiting the owner. That is not the theory of the statute. Its purpose was, in the language of this court,

> "that the furnisher of such commodities as are necessary to enable a ship to enter upon or pur-

> sue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor."
>
> (*The South Coast, supra.*)

Nor is the fact that the charter party of the "Portland" gives a lien on the ship

"for all moneys paid in advance and not earned"

any ground for distinguishing the two cases. This clause refers to a lien given *by the owners to the charterers* and is not concerned in the least with liens given *by the charterer to third persons.*

Next, an attempt is made to distinguish *The South Coast* on the ground that in that case the charterers ordering the supplies were actually the owners *pro hac vice,* and had possession and control of the vessel (and, therefore, were presumed under the statute to have authority to impose a lien), whereas in the instant case the charterers were not in possession and, therefore, had no presumptive right to pledge the vessel. Let us be accurate. In *The South Coast* case none of the three courts by whom the facts of the case were considered, made reference to the possession of the charterer or put the decision on that ground. It was expressly held that supplies were furnished on the order from the master, whose power to impose the lien was not excluded by the charter party. To argue, therefore, that the case at bar is distinguishable because *this* charterer did not have full possession and control, is simply to introduce a false quantity into the case. Moreover, in this case the supplies were ordered by the master.

The third and last ground of distinction urged in claimant's brief is based upon the fact that there was a general contract between the libelant and the charterer for the supply of fuel oil, the charterer being well known to the libelant, whereas in *The South Coast* case there was no standing contract and therefore the furnishers there "relied upon the credit of the vessel" (appellant's brief, page 13). Is this not an argument that this libelant must allege and prove "credit to the vessel"? And is this not precisely what the Act of 1910 expressly relieves libelant from doing? This is so plain that we confess to some surprise that the point should be urged.

Other cases cited by claimant.

Most of the other cases cited by claimant,

The Oceana, 233 Fed. 139; 244 Fed. 80;
The Castor, 267 Fed. 608;
The Mary A. Tryon, 93 Fed. 220;
The Penn, 266 Fed. 933,

are to the point that one knowing that he is dealing with a charterer is put on inquiry as to the terms of the charter party. This we do not dispute.

The case of *Curacao Trading Co. v. Bjorje,* 263 Fed. 693, was decided on the express ground that the supplies therein involved were ordered, *not by the master, but by the charterers.* The libelant, therefore, did not enter court clothed with a prima facie lien, as in the case at bar, but, on the contrary, was required to prove that the charterers were authorized to pledge the vessel. He failed in sustaining this burden of proof.

We do not consider it necessary or material to consider the effect of the agreement between Mr. Keown and Mr. Chesebrough that the supplies should be charged to the vessel, save that we desire to point out (in contradiction to counsel's argument on page 13), that this agreement shows that the libelant in fact relied upon the credit of the vessel. The supplies were, therefore, furnished in foreign ports under circumstances which would have imposed a lien prior to the Act of 1910.

We may also say, in passing, that it must have been by inadvertence that learned counsel for claimant argues that this agreement between Mr. Keown and Mr. Chesebrough was invalid because not in writing, for of course he knows the decision of the United States Supreme Court in

Union Fish Co. v. Erickson, 248 U. S. 308; 63 L. Ed. 261.

Moreover, this was not a contract which, *by its terms,* was not to be performed within a year.

CONCLUSION.

The latter part of claimant's brief, with its references to the "innocent owner" and debts "speculatively, rashly and unnecessarily incurred" is the old resort to sentimentality where argument fails. The statute was not designed to give a lien only for supplies for which, as between the owner and the charterer, the owner had to pay, but for all supplies or-

dered by parties authorized actually or by presumption to order them, to the end, as the court suggested in *The South Coast, supra,* that vessels might proceed about their business without undue let or hindrance.

The libelant delivered supplies upon the master's orders, a person who by statute and on principle was authorized to order supplies for the vessel. If he was not in fact so authorized, claimant failed to incorporate such a provision in the charter party. If claimant wished to deprive the master of this power, it was an easy matter so to provide in the charter party. We may say finally that, in its last analysis, the claimant's defense is based upon a presumption designed to counteract the effect of the statute. This point cannot be better expressed than it was in the brief filed in this court by the appellee in *The South Coast,*

> "A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law, he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently, you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23rd, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien, except, affirmative proof that he

knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel."

We submit that this logic is unanswerable.

Dated, San Francisco,
March 1, 1921.

Respectfully submitted,

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